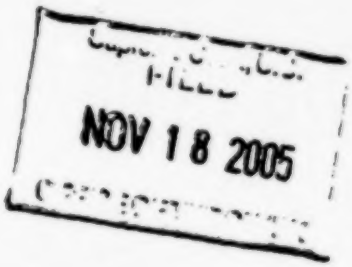
6



No. 05-380

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES,
ATTORNEY GENERAL,

Petitioner,

v.

LEROY CARHART, ET. AL,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND 70 MEMBERS OF CONGRESS IN SUPPORT OF PETITIONER

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
WALTER M. WEBER
ERIK M. ZIMMERMAN
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Counsel for Amici

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE PARTIAL BIRTH ABORTION BAN ACT IS AN IMPORTANT BULWARK AGAINST INFANTICIDE 2

II.. CONGRESS GAVE EXTENSIVE CONSIDERATION TO THE PARTIAL BIRTH ABORTION BAN ACT 7

A. The 104th Congress (1995-1996) 8

B. The 105th Congress (1997-1998) 11

C. The 106th Congress (1999-2000) 11

D. The 107th Congress (2001-2002) 12

E. The 108th Congress (2003-2004) 13

CONCLUSION 15

ADDENDUM: LIST OF INDIVIDUAL AMICI 1a

TABLE OF AUTHORITIES

Page

CASES

Harris v. McRae, 448 U.S. 297 (1980) 1

Levy v. Louisiana, 391 U.S. 68 (1968) 2

Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436 (S.D.N.Y. 2004) ..... 8, *passim*

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 5

Roe v. Wade, 410 U.S. 113 (1973) 2

Schall v. Martin, 467 U.S. 253 (1984) 2

Stenberg v. Carhart, 530 U.S. 914 (2000) ..... 2, *passim*

United States v. Lopez, 514 U.S. 549 (1995) 1

United States v. Morrison, 529 U.S. 598 (2000) 1

United States v. Vuitch, 402 U.S. 62 (1971) 1

STATUTES AND LEGISLATIVE MATERIALS

18 U.S.C. § 1531 ..... 1, *passim*

141 Cong. Rec. 17892-93 (Dec. 4, 1995) 9

141 Cong. Rec. H11597-11612 (Nov. 1, 1995) 9

141 Cong. Rec. S18,196-97, 104th Cong., 1st Sess. (Dec. 7, 1995) 6

149 Cong. Rec. H8992 (Sept. 30, 2003) 14

149 Cong. Rec. H9142-9146 (Oct. 2, 2003) 14

149 Cong. Rec. S13,127-29, 108th Cong., 1st Sess. (Oct. 23, 2003) 6

149 Cong. Rec. S3384-3386 (Mar. 10, 2003) 13

149 Cong. Rec. S3457-3471 (Mar. 11, 2003) 13

Effects of Anesthesia During a Partial-Birth Abortion: Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution, 104th Cong., 2d Sess. (Mar. 21, 1996) 10

H.R. 1122 11

H.R. 1833 8-10

H.R. 3660 12

H.R. 4965 ..... 12, 13

H.R. 760 ..... 13, 14

H.R. 929 11

H.R. Doc. No. 104-198, 104th Cong., 2d Sess. (1996) 10

H.R. Doc. No. 105-158, 105th Cong., 1st Sess. (1997) ... 11

Partial-Birth Abortion Ban Act of 1995, H.R. Rep. No. 104-267, 104th Cong., 1st Sess. (1995) 4, 8

Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) 3, 4, 6, 9

Partial-Birth Abortion Ban Act of 2002, H.R. Rep. No. 107-604, 107th Cong., 2d Sess. (2002) 12, 13

Partial-Birth Abortion Ban Act of 2002: Hearing on H.R. 4965 before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Cong., 2d Sess. (2002) 4, 6, 12, 13

Partial-Birth Abortion Ban Act of 2003, H.R. Rep. No. 108-58, 108th Cong., 1st Sess. (2003) ..... 6, *passim*

Partial-Birth Abortion Ban Act of 2003: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 108th Cong., 1st Sess. (Mar. 25, 2003) 6, 14

Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (June 15, 1995) 6, 8

Partial-Birth Abortion: Joint Hearing Before the Senate Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., 1st Sess. (1997) 4, 6, 11

S. 1692 12

S. 3 ..... 13, 14

OTHER

Alan Guttmacher Institute, *Induced Abortion in the United States* (May 18, 2005) (available at www.agi-usa.org/pubs/fb_induced_abortion.html) 2

Chang, Berg, Saltzman & Herndon, *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991-1999*, 95 Am. J. Pub. Health 471 (2005) 3

Diane Sussman, *Abandoned Babies: Legislators, health officials unite to curb recent trend* (Mar. 16, 2000) (available at www.nurseweek.com/features/00-03/abandon.html) 3

Finer & Henshaw, *Estimates of U.S. Abortion Incidence in 2001 and 2002*, Alan Guttmacher Institute (2005) 2

Francis Crick, 220 Nature 429-30 (1968) 3

Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortions*, Presented at the National Abortion Federation Risk Management Seminar (Sept. 13, 1992) 8

Peter Singer, *Writings on an Ethical Life* (2000) 3

INTEREST OF AMICI[1]

The American Center for Law and Justice is a public interest law firm dedicated, *inter alia*, to the defense of the sanctity of human life. The remaining amici are Members of the United States Congress. Those amici Members who were in office at the time supported enactment of the federal Partial Birth Abortion Ban Act (PBA Act). All of the amici Members support Congress's proscription, within the proper limits of Congress's power,[2] of the brutal partial birth abortion procedure. (A list of the individual Members is attached as an Addendum.)

SUMMARY OF ARGUMENT

This case merits review because the court below held unconstitutional an Act of Congress that sought to maintain a firm bulwark against the practice of infanticide. In addition, the extensive consideration that Congress gave to this legislation makes the Eighth Circuit's facial invalidation of the PBA Act appropriate for review in this Court.

---

[1]The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2]The federal government does not have a general criminal police power. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000); *United States v. Lopez*, 514 U.S. 549, 564, 566-67 (1995). Congress can only limit abortion in contexts where Congress has constitutional authority, e.g,, the use of federal funds (as in *Harris v. McRae*, 448 U.S. 297 (1980)), the governance of federal territories (as in *United States v. Vuitch*, 402 U.S. 62 (1971)), and the regulation of interstate commerce (as with the PBA Act). The PBA Act contains an express link to interstate commerce. *See* 18 U.S.C. § 1531(a) ("in or affecting interstate or foreign commerce").

ARGUMENT

I. THE PARTIAL BIRTH ABORTION BAN ACT IS AN IMPORTANT BULWARK AGAINST INFANTICIDE.

Partial birth legislation operates at the borderline between prenatal and postnatal human life. Under *Roe v. Wade*, 410 U.S. 113 (1973), this border separates human non-persons from human persons, and constitutional "rights" from legal wrongs.

Born human children indisputably enjoy the basic rights secured to all "persons" under the Fourteenth Amendment. *E.g.*, *Levy v. Louisiana*, 391 U.S. 68, 70 (1968). It therefore "cannot be doubted" that there is a "legitimate and compelling state interest" in protecting such children from harm, *see Schall v. Martin*, 467 U.S. 253, 264 (1984) (internal quotation marks and citation omitted). Hence, governments have a compelling interest in preventing the spread of the practice of abortion into infanticide. The PBA Act furthers precisely that interest.

The frequency of abortions throughout pregnancy,[3] the gruesome and barbaric methods used,[4] and the consequent devaluing of human life in the eyes of society, as reflected in the

---

[3]According to the Alan Guttmacher Institute (AGI), which is the research arm of Planned Parenthood, there were 1.29 million abortions in 2002. AGI, *Induced Abortion in the United States* (May 18, 2005) (available at www.agi-usa.org/pubs/fb_induced_abortion.html) (citing Finer & Henshaw, *Estimates of U.S. Abortion Incidence in 2001 and 2002*, AGI (2005)). Abortions are done throughout pregnancy. *Id.* (pie chart showing breakdown by stage of pregnancy).

[4]*See Stenberg v. Carhart*, 530 U.S. 914, 923-28 (2000) (describing abortion methods); *id.* at 946 (Stevens, J., concurring) ("gruesome procedures"); *id.* at 958-59 (Kennedy, J., dissenting) (in D&E procedure, "[t]he fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb"; in D&X procedure, "the abortionist tears open the skull").

widespread phenomena of "dumpster babies"[5] and violence against pregnant women,[6] all threaten to lead to the acceptance of infanticide, especially in the first moments after birth.[7] Partial birth procedures represent the beachhead of this assault on postnatal life, the bridge between abortion and infanticide. Absent strong legal barriers and vigorous societal condemnation, partial birth procedures open the way to legal infanticide.[8] *See*

---

[5]*See* Diane Sussman, *Abandoned Babies: Legislators, health officials unite to curb recent trend* (Mar. 16, 2000) (available at www.nurseweek.com/features/00-03/abandon.html) (13 dumpster babies reported within 10 months in Houston; incidents reflective of national concern).

[6]Chang, Berg, Saltzman & Herndon, *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991-1999*, 95 Am. J. Pub. Health 471 (2005).

[7]Indeed, prominent academic voices already have sought to justify infanticide. *See* Peter Singer, *Writings on an Ethical Life* (2000) pp. 160 ("If the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either"), 161 ("the grounds for not killing persons do not apply to newborn infants"); Francis Crick, 220 Nature 429-30 (1968).

[8]In fact, witnesses made that precise point at congressional hearings.

> If partial birth abortions remain legal -- if Congress allows them to continue -- what next? Killing a child who has emerged from the womb three or four more inches or maybe killing them a few hours later after the opportunity to examine whether or not they suffer from some disability? All of these have already been suggested by scholarly writers who support late term abortions. Opponents of this bill keep asking whether it will be a first step in an effort to ban all abortions, but the real question is whether allowing this procedure is not a step towards legalized infanticide.

Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. 114-15 (1995) [hereinafter Nov. 1995 Senate Hearing] (Statement of Helen Alvare of the

(continued...)

Stenberg v. Carhart, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) (states have an interest in "forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus")

Governments -- and all their people -- therefore have a tremendously important stake in the unqualified prohibition of

---

[8](...continued)
National Conference of Catholic bishops); *see generally id.* at 112-19 (entire Alvare statement); see *also, e.g., Partial-Birth Abortion Ban Act of 2002: Hearing on H.R. 4965 before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 107th Cong., 2d Sess. 27 (2002) [hereinafter July 2002 House Hearing] (Statement of Dr. Curtis Cook) ("blurring the line between abortion and infanticide"); *id.* at 13 (testimony of Dr. Kathi A. Aultman).

Members of Congress voiced the same concern. *See Partial-Birth Abortion: Joint Hearing Before the Senate Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 105th Cong., 1st Sess. (1997) [hereinafter March 1997 Joint Hearing] (Statement of Sen. Hatch) ("[T]he real issue is whether knowingly permitting this procedure to continue would serve as a first step towards legalized infanticide"); *see also, e.g., Partial-Birth Abortion Ban Act of 1995*, H.R. Rep. No. 104-267, 104th Cong., 1st Sess. 11 (1995) ("The difference between partial-birth abortion and infanticide is a mere three inches. The 'Partial-Birth Abortion Ban Act' would protect children from being killed during the delivery process"); Nov. 1995 Senate Hearing (Statement of Sen. Grassley) ("But the bottom line is really legal, stopping the head just short of the birth is a legal fig leaf for a procedure that doesn't look like abortion at all, it looks like infanticide"); *id.* (Remark of Sen. Thompson) ("[I]t seems to me that the question is whether or not a partial birth abortion should be treated as infanticide"); July 2002 House Hearing 1 (Statement of Rep. Chabot) ("Partial birth abortion is the termination of the life of a living baby just seconds before it takes its first breath outside the womb. The procedure is violent. It's gruesome. It's infanticide"); *id.* at 49 (Statement of Rep. Forbes) ("The difference between partial birth abortion procedure and infanticide is a mere 3-inches").

partial birth infanticide. The child who "crosses the goal line" -- by foot or head -- into the realm outside the mother's body must receive the full protection of the law if we are not to abandon, inexorably, the sanctity of postnatal life as well.

Critics of laws banning partial birth infanticide cynically charge that the same prenatal child still faces death by other techniques -- such as poisoning or dismemberment -- which operate while the child remains entirely in the womb. Their objection has undeniable force: "Those who oppose abortion would agree, indeed would insist, that both procedures are subject to the most severe moral condemnation, condemnation reserved for the most repulsive human conduct." *Stenberg*, 530 U.S. at 963 (Kennedy, J., dissenting). *See also Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality"); *id.* at 852 (abortions are "procedures some deem nothing short of an act of violence against innocent human life"). But this is "not inconsistent . . . with the further proposition that as an ethical and moral matter [partial birth abortion] is distinct . . . and is a more serious concern for medical ethics and the morality of the larger society . . . . " *Stenberg*, 530 U.S. at 963 (Kennedy, J., dissenting). The partial birth procedure "perverts the natural birth process," *id.* at 962-63. Crucially, partial birth laws seek to halt the *extension* of gruesome abortion practices into gruesome infanticide. The child who breaks the plane of the mother's body "touches home plate," so to speak, and ought to be safe from destruction even though equally deserving children regrettably may be slain just inches away. This "bright line,"[9] while not as protective of preborn life as justice might dictate,

---

[9]The federal statute at issue here draws a line which, while also "bright," is even more modest. Unless the baby's "entire . . . head" or the "trunk past the navel" is delivered "outside the body of the mother," the statute does not apply. 18 U.S.C. § 1531(b)(1)(A).

nevertheless represents an important barrier against the encroachment of abortion into infanticide.

Critics find fault with the absence of a "health" exception in the PBA Act. But partial birth laws are an expression of Western Civilization's longstanding prohibition of infanticide, and such laws need not contain exceptions for children whose death would improve the mother's health. Invoking an adult's "health" as a reason for killing an innocent child should be unthinkable in a civilized society. In any event, Congress reasonably found that the partial birth procedure is never the only medically necessary or available option. *Partial-Birth Abortion Ban Act of 2003*, H.R. Rep. No. 108-58, 108th Cong., 1st Sess. 12, 14-19 & n.83 (2003).[10] A mandatory "health" exception, moreover, improperly "awards each physician a veto power over the State's judgment that the procedures should not be performed." *Stenberg*, 530 U.S. at 964 (Kennedy, J., dissenting).

The central goal of the federal partial birth statute is the defense of the border against the encroachment of abortion into

---

[10] *See also, e.g., Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 38-44 (June 15, 1995) [hereinafter June 1995 House Hearing] (testimony of Dr. Pamela Smith); Nov. 1995 Senate Hearing 75-83, 109-112 (testimony of Drs. Nancy Roemer and Pamela Smith); March 1997 Joint Hearing 120-24 (testimony of Dr. Curtis R. Cook); July 2002 House Hearing 12, 26-28 (testimony of Drs. Curtis R. Cook and Kathi A. Aultman); *Partial-Birth Abortion Ban Act of 2003: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 6-10 (Mar. 25, 2003) [hereinafter March 2003 House hearing] (testimony of Dr. Mark G. Neerhof); 149 Cong. Rec. S13,127-29, 108th Cong., 1st Sess. (Oct. 23, 2003) (Letters from Drs. Nathan Hoeldtke, Susan E. Rutherford, T. Murphy Goodwin, Daniel J. Wechter, and Byron C. Calhoun to Sen. Santorum submitted by Sen. Santorum); 141 Cong. Rec. S18,196-97, 104th Cong., 1st Sess. (Dec. 7, 1995) (Letters from Drs. Dorothy Czarnecki, L. Laurie Scott, Mary Davenport, Margaret Nordell, and Karin E. Shinn to Senator Smith).

infanticide. What matters most to this specific defense is the protection of all children who, while still alive and therefore capable of being protected, break the plane that currently marks the dividing line between abortion and infanticide. The label the abortionist uses for his lethal procedure is irrelevant. The reason for using this macabre method of killing is irrelevant. What is crucial is maintenance of the bulwark against infanticide, a bulwark that would be pulverized by allowance of "a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life," *Stenberg*, 530 U.S. at 979 (Kennedy, J., dissenting).

II. CONGRESS GAVE EXTENSIVE CONSIDERATION TO THE PARTIAL BIRTH ABORTION BAN ACT.

Congress devoted substantial time and effort to weighing the arguments for and against the challenged PBA Act, before reaching a considered bipartisan judgment that partial birth abortion should be prohibited.

The Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, P.L. 108-105, 117 Stat. 1201-06, signed by President Bush on November 5, 2003, became law only after more than eight years of Congressional deliberation and analysis. Four different Congresses conducted six hearings on such legislation and heard from dozens of doctors, nurses, medical associations, professors, Members of Congress and private citizens. After reviewing all the evidence before it, Congress concluded that the Act promoted salutary goals and that "partial-birth abortion is never necessary to preserve the health of a woman and should, therefore, be banned."[11] These factual determinations warrant significant deference by the federal judiciary. Before this Court allows that determination to be held for naught, this Court should review the

---

[11] Partial-Birth Abortion Ban Act of 2003, H.R. Rep. No. 108-58, at 12 (Apr. 3, 2003).

matter itself.

A. The 104th Congress (1995-1996)

Congress first considered a partial birth abortion ban in 1995. Representative Charles Canady introduced H.R. 1833, the Partial-Birth Abortion Ban Act of 1995, on June 14, 1995.[12] The first of three hearings on this bill took place in the House on June 15, 1995.[13] Dr. Pamela Smith, Dr. Robert J. White, and a neonatal nurse named Mary Ellen Morton testified in favor of the ban at the hearing while Dr. J. Courtland Robinson and Tammy Watts, a woman who had undergone an abortion, testified against it.[14] The House also heard Professor David M. Smolin discuss the ban's constitutionality, and the record contains additional statements and research papers from doctors, advocacy groups, and a Member of Congress.[15] The record included Dr. Martin Haskell's 1992 paper, *Dilation and Extraction for Late Second Trimester Abortion*, the very paper that, according to Congress, "sparked a national debate over the partial-birth abortion procedure."[16] Additional statements about the ban by physicians such as Mitchell Creinin, Lewis H. Koplik, and Bruce Ferguson were introduced into the record during the November 1, 1995

---

[12] H.R. Rep. No. 108-58, at 12.

[13] *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 443 (S.D.N.Y. 2004); June 1995 House Hearing; H.R. Rep. No. 104-267, 104th Cong., 1st Sess. (1995).

[14] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 443 (citing June 1995 House Hearing).

[15] *Id.* at 443-44 (citing June 1995 House Hearing).

[16] H.R. Rep. No. 108-58, at 2 (citing Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortions*, Presented at the National Abortion Federation Risk Management Seminar (Sept. 13, 1992)); *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 443-44.

House debates.[17] The House approved the bill by a bipartisan vote of 288-139.[18]

The Senate Judiciary Committee held the second hearing on H.R. 1833 on November 17, 1995.[19] Five physicians testified: Drs. Pamela Smith and J. Courtland Robinson reiterated the testimony they had given before the House committee, while Drs. Norig Ellison, Nancy Romer, and Mary Campbell also testified about the ban.[20] The committee also heard testimony from Brenda Pratt Schaefer (a registered nurse), Helen Alvare from the National Conference of Catholic Bishops, two law professors, and three women who had complications during the later stages of their pregnancies.[21] The numerous contributors to the hearing record included Dr. Warren M. Hern, women who had undergone an abortion, a Senator, lawyers testifying about the bill's implications and constitutionality, the National Abortion Federation, the American College of Obstetricians and Gynecologists, the American Nurses Association, and Planned Parenthood Federation of America.[22] During the Senate floor debate over H.R. 1833 from December 5-7, 1995, a letter from Dr. Antonio Scommegna was added to the record.[23] The Senate approved the bill, in amended form, by a bipartisan 54-44 vote

---

[17] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 444; *see also* 141 Cong. Rec. H11597-11612 (Nov. 1, 1995).

[18] H.R. Rep. No. 108-58, at 13.

[19] H.R. Rep. No. 108-58, at 13 (citing Nov. 1995 Senate Hearing).

[20] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 444 (citing Nov. 1995 Senate Hearing).

[21] *Id.* (citing Nov. 1995 Senate Hearing).

[22] *Id.* (citing Nov. 1995 Senate Hearing).

[23] *Id.* (citing 141 Cong. Rec. 17892-93 (Dec. 4, 1995)).

on December 7, 1995.[24]

The final hearing on H.R. 1833, entitled *Effects of Anesthesia During a Partial-Birth Abortion*, was held on March 21, 1996 by the House Subcommittee on the Constitution.[25] Several physicians -- Drs. Norig Ellison (who testified before the Senate earlier), David Birnbach, David Chestnut, and Jean Wright -- all said that administering an anesthetic to the mother does not alleviate fetal pain during a partial birth abortion.[26] Previous Senate witnesses Brenda Pratt Shafer, Helen M. Alvare, and Coreen Costello reiterated their previous remarks at the hearing.[27] Also, Mary-Dorothy Line opposed the ban due to her past experience having undergone a partial birth abortion.[28]

On March 27, 1996, the House approved a slightly amended version of the ban by a 286-129 vote,[29] but President Clinton vetoed the bill.[30] While the House overrode the veto 285-137 on September 19, 1996, the Senate's vote of 58 to 40 in favor of override fell short of the necessary two-thirds.[31]

---

[24] H.R. Rep. No. 108-58, at 13 & n.67.

[25] *Id.* (citing *Effects of Anesthesia During a Partial-Birth Abortion: Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 104th Cong., 2d Sess. (Mar. 21, 1996) [hereinafter Mar. 1996 House Hearing]).

[26] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 444 (citing Mar. 1996 House Hearing).

[27] *Id.* (citing Mar. 1996 House Hearing).

[28] *Id.* (citing Mar. 1996 House Hearing).

[29] H.R. Rep. No. 108-58, at 13.

[30] *Id.*; *see also* H.R. Doc. No. 104-198, 104th Cong., 2d Sess. (1996) (the President's veto statement).

[31] H.R. Rep. No. 108-58, at 13.

B. The 105th Congress (1997-1998)

Rep. Charles Canady introduced a partial birth abortion ban, H.R. 929, on March 5, 1997.[32] On March 11, the Senate Committee on the Judiciary and the House Subcommittee on the Constitution held a joint hearing on the bill.[33] The hearing and its record included statements from Dr. Curtis Cook and other physicians, a Center for Disease Control official, women that had undergone partial birth abortions, Members of Congress, constitutional law scholars, representatives of the abortion industry, and pro-life and pro-abortion advocacy groups such as Planned Parenthood and the National Right to Life Committee.[34]

On March 20, 1997, the House debated a bill very similar to H.R. 929 (H.R. 1122, the Partial-Birth Abortion Ban Act of 1997) and approved it 295 to 136.[35] The Senate examined H.R. 1122 on May 15 and 20, 1997, and approved it 64-36.[36] President Clinton again vetoed the bill.[37] The House voted to override the veto by a vote of 296 to 132 on July 23, 1998; the Senate's vote of 64-36 on September 18, 1998, fell just short of the two-thirds required for override.[38]

C. The 106th Congress (1999-2000)

During the 106th Congress, both Chambers approved versions

---

[32] *Id.*

[33] *Id.*; Mar. 1997 Joint Hearing.

[34] H.R. Rep. No. 108-58, at 13; *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 445-46 (citing Mar. 1997 Joint Hearing).

[35] H.R. Rep. No. 108-58, at 13.

[36] *Id.*

[37] *Id.*; *see also* H.R. Doc. No. 105-158, 105th Cong., 1st Sess. (1997) (the President's veto statement).

[38] H.R. Rep. No. 108-58, at 13.

of a ban but neither conducted additional hearings. Rep. Canady introduced H.R. 3660, a bill identical to the one approved by the House in the 105th Congress.[39] H.R. 3660 was eventually approved 287-141 by the House.[40] On October 5, 1999, Senator Rick Santorum introduced a bill (S. 1692) banning partial birth abortion in the Senate which differed from H.R. 3660 in some respects.[41] S. 1692 was considered by the Senate on October 19-21, 1999, and approved 63-34 on October 21.[42] When the House considered S. 1692, it amended the bill by inserting the text of H.R. 3660 and approved it on May 25, 2000.[43] Congress took no further action on the bill after the *Stenberg* decision was issued in June 2000[44] in order to study the decision and ensure that any future potential birth legislation would be consistent with it.[45]

D. The 107th Congress (2001-2002)

Rep. Steve Chabot introduced H.R. 4965 on June 19, 2002, the first partial birth abortion bill after *Stenberg*.[46] On July 9, 2002, the House Subcommittee on the Constitution held a hearing on the bill.[47] The four witnesses testifying at the hearing were Dr. Kathi Aultman, Dr. Curtis Cook, Professor Robert A.

---

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 13 n.68.

[45] *See, e.g.*, H.R. Rep. No. 108-58, at 6, 63; *Partial-Birth Abortion Ban Act of 2002*, H.R. Rep. No. 107-604, 107th Cong., 2d Sess. (2002); July 2002 House Hearing 2 (Statement of Rep. Chabot).

[46] H.R. Rep. No. 108-58, at 14.

[47] *Id.*; July 2002 House Hearing.

Destro, and Simon Heller of the Center for Reproductive Law and Policy (who represented the plaintiff in *Stenberg*).[48] Representatives Steve Chabot and Randy Forbes also submitted material to the subcommittee,[49] and the record included medical papers, letters from physicians, and statements from the American Medical Association (AMA), the American College of Obstetricians (ACOG), and the Physicians' Ad Hoc Coalition for Truth (PHACT).[50] While the House approved H.R. 4965 on July 24, 2002, by a 274-151 vote, the Senate failed to take action on the bill.[51]

E. The 108th Congress (2003-2004)

A federal partial birth abortion ban was finally enacted during the 108th Congress. Rep. Steve Chabot introduced H.R. 760 -- identical to H.R. 4965 -- on February 13, 2003.[52] Senator Rick Santorum introduced a parallel bill (S. 3) the following day.[53] The Senate reviewed S. 3 on March 10-13, 2003, and approved an amended version of it by a 64-33 vote.[54] The record of the Senate debate includes statements from Drs. Natalie Roche, Gerson Weiss, and Curtis Cook as well as women that had undergone abortions.[55]

---

[48] H.R. Rep. No. 108-58, at 14.

[49] H.R. Rep. No. 107-604, at 22.

[50] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 447-48 (citing July 2002 House Hearing).

[51] H.R. Rep. No. 108-58, at 14.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See* 149 Cong. Rec. S3384-3386 (Mar. 10, 2003); 149 Cong. Rec. S3457-

(continued...)

The House Subcommittee on the Constitution held a hearing on H.R. 760 on March 25, 2003.[56] Those testifying were Dr. Mark G. Neerhof, Simon Heller (for the second time), and Professor Gerard V. Bradley.[57] Those whose statements were offered into the record included Drs. Philip D. Darney, Daniel J. Wechter, Watson Bowes, Steve Calvin, Nathan Hoeldtke, Byron C. Calhoun, T. Murphy Goodwin, and Susan E. Rutherford as well as Physicians for Reproductive Choice and Health (PRCH), the American Medical Women's Association (AMWA), ACOG, and PHACT.[58] The House passed H.R. 760 by a 282-139 vote on June 4, 2003.[59] The House approved the conference report for S. 3 by a 281-142 vote on October 2, 2003[60] while the Senate did so by a 64-34 vote on October 21, 2003.[61] President Bush signed the Partial-Birth Abortion Ban Act of 2003 into law on November 5, 2003.[62]

* * *

In sum, Congress extensively considered the PBA Act over several years, both before and after the Court's *Stenberg* decision. Congress heard testimony by, and received submissions from, physicians, lawyers, organized groups, private

---

(...continued)
3471 (Mar. 11, 2003).

[56] H.R. Rep. No. 108-58, at 14; March 2003 House Hearing.

[57] H.R. Rep. No. 108-58, at 14.

[58] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 448-49 (citing March 2003 House Hearing).

[59] *Id.* at 449.

[60] *Id.*; *see also* 149 Cong. Rec. H8992 (Sept. 30, 2003); 149 Cong. Rec. H9142-9146 (Oct. 2, 2003).

[61] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 449.

[62] 18 U.S.C. § 1531, P.L. 108-105, § 3(a), 117 Stat. 1201-06.

individuals, and the like -- all different types of parties, and both proponents and opponents of this law -- about the importance of restricting this procedure, any claimed medical need for it, the effects of the Act, and the Act's constitutionality. Congress's judgment that the procedure as defined in the PBA Act should be prohibited in order to reflect American society's horror at infanticide is entitled to considerable respect and deference. The Eighth Circuit's invalidation of that considered judgment merits review by this Court.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Walter M. Weber
Erik M. Zimmerman
American Center for Law
& Justice
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Counsel for Amici

November 18, 2005

ADDENDUM

Addendum: List of Individual Amici

Sen. Tom Coburn (Oklahoma)
Sen. Jim DeMint (South Carolina)
Sen. Rick Santorum (Pennsylvania)
Rep. Robert B. Aderholt (Alabama – 4th District)
Rep. W. Todd Akin (Missouri – 2nd District)
Rep. J. Gresham Barrett (South Carolina – 3rd District)
Rep. Roscoe G. Bartlett (Maryland – 6th District)
Rep. Rob Bishop (Utah – 1st District)
Rep. Marsha Blackburn (Tennessee – 7th District)
Rep. Kevin Brady (Texas – 8th District)
Rep. Michael C. Burgess (Texas – 26th District)
Rep. Dan Burton (Indiana – 5th District)
Rep. Steve Chabot (Ohio – 1st District)
Rep. Tom Cole (Oklahoma – 4th District)
Rep. Jo Ann Davis (Virginia – 1st District)
Rep. Tom DeLay (Texas – 22nd District)
Rep. John T. Doolittle (California – 4th District)
Rep. Tom Feeney (Florida – 24th District)
Rep. Jeff Flake (Arizona – 6th District)
Resident Commissioner Luis G. Fortuño (Puerto Rico)
Rep. Virginia Foxx (North Carolina – 5th District)
Rep. Trent Franks (Arizona – 2nd District)
Rep. Scott Garrett (New Jersey – 5th District)
Rep. Phil Gingrey (Georgia – 11th District)
Rep. Virgil H. Goode, Jr. (Virginia – 5th District)
Rep. Mark Green (Wisconsin – 8th District)
Rep. Gil Gutknecht (Minnesota – 1st District)
Rep. Ralph M. Hall (Texas – 4th District)
Rep. Melissa A. Hart (Pennsylvania – 4th District)
Rep. Robin Hayes (North Carolina – 8th District)
Rep. J.D. Hayworth (Arizona – 5th District)
Rep. Wally Herger (California – 2nd District)
Rep. Peter Hoekstra (Michigan – 2nd District)
Rep. John N. Hostettler (Indiana – 8th District)

Rep. Duncan Hunter (California – 52nd District)
Rep. Bob Inglis (South Carolina – 4th District)
Rep. Ernest J. Istook, Jr. (Oklahoma – 5th District)
Rep. Sam Johnson (Texas – 3rd District)
Rep. Walter B. Jones (North Carolina – 3rd District)
Rep. Steve King (Iowa – 5th District)
Rep. John Kline (Minnesota – 2nd District)
Rep. Ron Lewis (Kentucky – 2nd District)
Rep. Donald A. Manzullo (Illinois – 16th District)
Rep. Patrick T. McHenry (North Carolina – 10th District)
Rep. Mike McIntyre (North Carolina – 7th District)
Rep. Jeff Miller (Florida – 1st District)
Rep. Sue Wilkins Myrick (North Carolina – 9th District)
Rep. Randy Neugebauer (Texas – 19th District)
Rep. Stevan Pearce (New Mexico – 2nd District)
Rep. Mike Pence (Indiana – 6th District)
Rep. Charles W. "Chip" Pickering (Mississippi – 3rd District)
Rep. Joseph R. Pitts (Pennsylvania – 16th District)
Rep. Ted Poe (Texas – 2nd District)
Rep. Rick Renzi (Arizona – 1st District)
Rep. Paul Ryan (Wisconsin – 1st District)
Rep. Jim Ryun (Kansas – 2nd District)
Rep. Jean Schmidt (Ohio – 2nd District)
Rep. F. James Sensenbrenner, Jr. (Wisconsin – 5th District)
Rep. Pete Sessions (Texas – 32nd District)
Rep. John B. Shadegg (Arizona – 3rd District)
Rep. Christopher H. Smith (New Jersey – 4th District)
Rep. Michael E. Sodrel (Indiana – 9th District)
Rep. Mark E. Souder (Indiana – 3rd District)
Rep. John Sullivan (Oklahoma – 1st District)
Rep. Thomas G. Tancredo (Colorado – 6th District)
Rep. Todd Tiahrt (Kansas – 4th District)
Rep. Zach Wamp (Tennessee – 3rd District)
Rep. Dave Weldon (Florida – 15th District)
Rep. Lynn A. Westmoreland (Georgia – 8th District)
Rep. Roger F. Wicker (Mississippi – 1st District)